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7
8 UNITED STATES DISTRICT COURT
DISTRICT OF OREGON AT PORTLAND

9 TANYA ANDERSEN, Individually and as) No. CV 07-934 BR
10 Representative of Others Similarly)
Situating) Plaintiff's Opposition to Defendants'
11) Motion to Dismiss First Amended
Plaintiff) Complaint
12)
v.)
13)
ATLANTIC RECORDING)
14 CORPORATION, a Delaware corporation;)
PRIORITY RECORDS, LLC, a California)
15 limited liability company; CAPITOL)
RECORDS, INC., a Delaware corporation;)
16 UMG RECORDINGS, INC., a Delaware)
corporation; and BMG MUSIC, a New)
17 York general partnership; RECORDING)
INDUSTRY ASSOCIATION OF)
18 AMERICA; SAFENET, INC., f/k/a)
MEDIA SENTRY, INC., a Delaware)
19 corporation; SETTLEMENT SUPPORT)
CENTER, LLC, a Washington limited)
20 liability company
21 Defendants.

22
23 **I. INTRODUCTION**

24 Ms. Andersen has sufficiently pleaded her claims. The Amended Complaint more than gives
25 notice of the factual and legal basis entitling her to relief. The pleadings are presumed truthful and
26 accurate and are afforded all reasonable inferences. The sufficient pleading, coupled with the many

1 remarkable misstatements of law and fact contained in Defendants' motion, requires the summary
2 denial of Defendants' motion.

3 Moreover and as an initial matter, a significant part of Defendants' motion has been rendered
4 moot. Judge Ashmanskas has determined that Ms. Andersen's counterclaims, filed during the
5 *Atlantic Recording Corp., et al v. Andersen* action (hereinafter known as "*Atlantic v. Andersen*"),
6 shall be voluntarily dismissed and heard here along with the other claims she now asserts in this case.

7 His Honor's findings and recommendation render moot all of Defendants' arguments asserting
8 improper "claim splitting" or joinder. Nevertheless, in addressing Defendants' misstatements of law
9 to this Court, Ms. Andersen will discuss why Defendants' position regarding improper "claim-
10 splitting" is simply without legal support.
11

12 **II. LEGAL ARGUMENT**

13 **A. ASSERTIONS OF "CLAIM SPLITTING" ARE MOOT AND MERITLESS.**

14 **1. Rejected "Claim Splitting" Argument.**

15 In late April 2007, while *Atlantic v. Andersen* was pending, Ms. Andersen discovered the
16 illegal and flawed national private investigation scheme devised by Defendants. This scheme was
17 the sole foundation of their campaign of intimidation which has for years inflicted damage to
18 many thousands of other private U.S. citizens across the nation, including Ms. Andersen. After
19 discovering this information, Ms. Andersen advised the court and the parties of her intention to
20 assert claims against new parties and to file new claims (in addition to her the pending counterclaims).
21

22 She requested a status conference to seek the court's input on how it preferred these new claims to be
23 asserted.
24

25 Two procedural options for handling the proposed new claims were discussed: (1) voluntarily
26 dismissing her counterclaims without prejudice so that they could be heard as part of a new action; or

1 (2) seeking leave to amend the *Atlantic v. Andersen* counterclaims to add new parties and new claims.

2 While the court made clear that it favored (for obvious procedural reasons) the first option, counsel
3 for the plaintiffs in *Atlantic v. Andersen* (hereinafter known as “Atlantic plaintiffs”) curiously objected
4 to the voluntary dismissal of counterclaims against them. After Ms. Andersen was required to
5 formally move for voluntary dismissal of her counterclaims, the Atlantic plaintiffs raised the same
6 “claim splitting” argument they assert here.¹

8 On September 18, 2007, Judge Ashmanskas issued his findings and recommendation that Ms.
9 Andersen’s “motion to voluntarily dismiss her counterclaims without prejudice (No. 136) should be
10 GRANTED so that they may be heard as part of *Andersen v. Atlantic Recording Corp.*, et al., CV 07-
11 934-BR.”² Because Ms. Andersen’s claims were dismissed, no complaint can be made about
12 maintaining “two separate actions involving the same subject matter at the same time in the same
13 court and against the same defendant.” Thus, the dismissal of Ms. Andersen’s claims render moot the
14 improper “claim-splitting” arguments and this Court should reject Defendants’ arguments on this
15 basis alone.

17 **2. Defendant’s Assertion of Compulsory Joinder is Also Moot.**

18 Defendants’ assertion that Ms. Andersen’s claims are barred by some application of the
19 compulsory joinder provisions of Federal Rule of Civil Procedure 13(a) is similarly misplaced.
20 Defendants acknowledge that the purpose of Rule 13(a) is to “prevent multiplicity of actions and
21 to achieve resolution in a single lawsuit of all disputes arising out of common matters.” After
22 consideration of judicial economy, Judge Ashmanskas appropriately recommended that the
23

24
25 ¹ See Plaintiffs’ Response in Opposition to Defendant’s Motion to Voluntarily Dismiss Counterclaims, Exhibit A to
26 Declaration of Benjamin Justus in Opposition to Defendants’ Motion to Dismiss First Amended Complaint (“Justus
Declaration”).

² See Findings and Recommendation of Judge Ashmanskas, entered on September 18, 2007, *Atlantic v. Andersen*, Docket

1 present action shall be the vehicle for disposition of Ms. Andersen's claims (and arguably the
2 claims of others similarly harmed). As such, Defendants' compulsory joinder argument is moot.

3 **3. "Claim Splitting" and Compulsory Joinder Arguments**
4 **No Basis to Dismiss Sufficiently Plead Claims.**

5 Even if not already moot, Defendants' improper "claim splitting" argument is without legal
6 basis. Defendants' assertions falsely presume that an adjudication of the counterclaims in *Andersen v.*
7 *Atlantic* in fact occurred. The holding in *Adams v. Cal. Dep't. of Health Services*, 487 F.3d 684 (9th
8 Cir. 2007), relied upon by Defendants simply has no application to the procedural history here.

9
10 *Adams* dealt with a situation where the plaintiff brought an action alleging civil rights
11 violations and other claims arising out of an alleged withdrawn offer of employment. Those claims
12 actually proceeded to trial, and the defendants prevailed. 487 F.3d at 686-687. A subsequent appeal
13 affirmed the trial court's decision. *Ibid.* Adams then brought a second action reasserting claims,
14 asserting additional claims and naming additional defendants. The district court dismissed the later
15 filed action. The 9th Circuit explained that:

16
17 Plaintiffs *generally* have no right to maintain two separate actions involving the *same*
18 *subject matter* at the *same time* in the same court and against the *same defendant*...To
19 determine whether a suit is duplicative, we borrow from the test for claim preclusion. As
20 the Supreme Court stated in *The Haytian Republic*, "the true test of the sufficiency of a
21 plea of 'other suit pending' in another forum [i]s the legal efficacy of the first suit, *when*
22 *finally disposed of*, as 'the thing adjudged,' regarding the matters at issue in the second
23 suit"... in assessing whether the second action is duplicative of the first, we examine
24 whether the causes of action and *relief sought*, as well as the parties or privies to the
25 action, are the same.

26 *Adams*, at 688-689 (citations omitted; emphasis added).

There was no adjudication or final disposition of the counterclaims whatsoever in *Atlantic v.*
Andersen. Judge Ashmanskas simply granted Ms. Andersen's motion for voluntary dismissal without

#150, Exhibit B to Justus Declaration. Objections to the Findings and Recommendation are due by October 3rd, 2007.

1 prejudice specifically in order to allow her to proceed with those and additional claims here. As
2 Judge Ashmanskas recognized, the Amended Complaint in this case involves different claims,
3 different parties, and different requested relief than the *Atlantic v. Andersen* counterclaims. In fact,
4 Judge Ashmanskas stated in his Findings and Recommendations of dismissal that “[e]ven a
5 superficial comparison of the counterclaims in the present action with the claims in the more
6 recently filed case belies [Atlantic] plaintiffs’ assertion that the second action is duplicative.” *See*
7 *Ex. B to Justus Declaration*, at 4. There is no logical basis or legal support for Defendants’ assertion
8 of compulsory joinder or “improper claim-splitting” in this case.
9

10 **B. CLAIMS SUFFICIENTLY PLEAD FOR EACH CAUSE OF ACTION**

11 **1. Standard For 12(b)(6) Motion To Dismiss.**

12 A Rule 12(b)(6) motion to dismiss cannot be granted where “state a short and plain
13 statement of the claim showing that the pleader is entitled to relief.” *Swierkiewicz v. Sorema N.A.*,
14 122 S.Ct. 992, 998 (2002). “[O]nce a claim has been stated adequately, it may be supported by
15 showing any set of facts consistent with the allegations in the complaint.” *Bell Atlantic Corp. v.*
16 *Twombly*, 127 S.Ct. 1955, 1969 (2007). When considering the sufficiency of the allegations, the
17 court must view the allegations in a light most favorable to the non-moving party, must presume
18 all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the
19 nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987); *see e.g.*
20 *Hawthorne v. Mac Adjustment, Inc.* 140 F.3d 1367, 1370 (11th Cir. 1998). A well-pleaded
21 complaint may proceed even if appears “that a recovery is very remote and unlikely”. *Scheuer v.*
22 *Rhodes*, 416 U.S. 232 (1974).
23
24
25
26

1 Unless Defendants demonstrate based on the pleadings alone “beyond doubt that the
2 plaintiff can prove no set of facts in support of his claim which would entitle him to relief” their
3 motion must be denied. *See* R. 12(b)(6); *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985);
4 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

5
6 **2. Dismissal At The Pleading Stage Based On Limitations Is Disfavored.**

7 Determining the date of discovery for application of the affirmative defense of statute of
8 limitations requires a fact-intensive examination on which defendants bear the burden of proof.
9 Because a Rule 12(b)(6) motion is intended to test the legal adequacy of the complaint, not to
10 address the merits of defendants’ affirmative defenses, courts permit the limitations defense to be
11 raised on a motion to dismiss only when the facts and the dates alleged in the complaint establish
12 that the claim is time-barred as a matter of law. *See, e.g., Kaiser Aluminum & Chem. Sales, Inc. v.*
13 *Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 & 1053-54 (5th Cir. 1980). Dismissal on statute of
14 limitations grounds can be granted pursuant to Rule 12(b)(6) “only if the assertions of the
15 complaint, read with the required liberality, would not permit the plaintiff to prove that the statute
16 was tolled.” *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980).

17
18 Typically, this issue cannot be considered until – at the earliest – summary judgment. *See,*
19 *e.g., Avco Corp. v. Precision Air Parts, Inc.*, 676 F.2d 494, 495 (11th Cir. 1982); *see also Young*
20 *v. Lepore*, 305 F.3d 1, 9 (1st Cir. 2002)(“[I]t is for the factfinder to determine whether a particular
21 collection of data was sufficiently aposematic to place an investor on inquiry notice.”); *In re Jiffy*
22 *Lube Sec. Litig.*, No. Y-98-1939, 1990 U.S. Dist. LEXIS 20141, at *11 (D. Md. Oct. 31,
23 1990)(“The question of when the misstatements should have been discovered is a question of fact
24
25
26

1 that can not be decided on a motion to dismiss”).³

2 Additionally, considering the provisions of F.R.C.P. 15(c) allowing later filed pleadings to
3 relate back to the date of those filed earlier, Defendants’ motion based on asserted statutes of
4 limitations applicable to particular claims must be denied.

5
6 **3. The Noerr-Pennington Doctrine and Oregon Litigation Privilege No Defense to Defendants’
Conspiracy and Other Wrongful Conduct Outside the Present Litigation.**

7 Ms. Andersen’s Amended Complaint arises from Defendants’ conspiracy to create and their
8 implementation of a massive enterprise of threat and intimidation. Amended Complaint, ¶6.3. This
9 conspiracy included a secret agreement to devise and implement an investigation protocol that
10 MediaSentry and all Defendants knew was illegal, flawed, and could not possible identify Ms.
11 Andersen and the many thousands of others wrongfully targeted by Defendants. *Id.* at ¶¶ 6.3-6.10.
12 The ultimate goal of the Defendants’ conspiratorial conduct was to maintain by illegal and improper
13 means their alleged 90% monopoly over the market for distributing music, *Id.* at ¶¶ 6.1, 6.25.

14 It is absurd to argue that the illegal, flawed online investigation scheme devised by Defendants
15 could be afforded protection under the U.S. Constitution through the *Noerr-Pennington* doctrine.
16 Defendants’ conspiracy and resulting massive invasion of privacy of private citizens was conducted in
17 a reckless, indiscriminate manner entirely outside the confines of litigation. Their “driftnet” tactics
18 were employed without any true regard to potential litigation against Ms. Andersen or any other
19 putative class member. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515
20 (1972)(“First Amendment rights may not be used as the means or the pretext for achieving
21 ‘substantive evils’ which the legislature has the power to control”).
22
23
24

25
26 ³ On a motion to dismiss, the court “must accept as true all well-pleaded allegations in the complaint and . . . construe those allegations in the light most favorable to the plaintiff.” *Rubenstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994). Moreover, “[a] statute of limitations bar is an affirmative defense, and plaintiffs are not required to negate an

1 Especially at the pleadings stage, Defendants' conspiratorial conduct cannot for immunity
2 purposes be viewed as "conduct incidental to the prosecution of the suit." *Columbia Pictures Indus.,*
3 *Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991), *aff'd*, 508 U.S. 49
4 (1993). Rather, Defendants' conduct (including conspiracy and their flawed and illegal investigative
5 activities) were instrumental to a central business enterprise entirely motivated to protect a
6 distribution monopoly. The conduct complained of is primarily extrajudicial. As pleaded,
7 Defendants' prosecution of tens of thousands of lawsuits was merely "incidental" to the unlawful
8 business enterprise.
9

10 The *Noerr-Pennington* doctrine is derived from the Petition Clause of the First Amendment.
11 Its purpose is to protect advocacy before all branches of government, including the judicial branch.
12 *California Motor Transp.*, 404 U.S. at 510. Specifically, the Petition Clause mentions only the right
13 to petition the Government for a redress of grievances. *See Allied Tube & Conduit Corp. v. Indian*
14 *Head, Inc.*, 486 U.S. 486 U.S. 492, at 499-500, 108 S.Ct. 1931, 108 S.Ct. 1931, 100 L.Ed.2d 497
15 (1988). Thus, "the applicability of *Noerr* immunity, varies with the context and nature of the activity."
16 *Allied Tube*, 486 U.S. at 499. In determining its application to civil litigation, the proper inquiry is
17 whether the conduct can be characterized as "typical" litigation activity, or is "more aptly
18 characterized as commercial activity" that happens to also involve litigation. *Venetian Casino Resort,*
19 *L.L.C. v. N.L.R.B.*, 484 F.3d 601, 612 (C.A.D.C. 2007), *citing Allied Tube*, 486 U.S. at 507.
20
21

22 The *Noerr-Pennington* doctrine, for example, does not protect lobbying efforts directed at
23 private parties. *Allied Tube*, at 499-500. The Supreme Court in *Allied Tube* explained that
24 "incidental" activity is not protected by *Noerr-Pennington* if its "context and nature ... make it the
25

26 affirmative defense in their Complaint." *LaGrasta v. First Union Sec. Inc.*, 358 F.3d 840, 845 (11th Cir. 2004)
(internal quotations omitted).

1 type of commercial activity that has traditionally had its validity determined by the antitrust laws
2 themselves.” *Id.* at 505. In the civil litigation context, *Noerr-Pennington* immunity does not extend to
3 activities that are “neither common features of litigation nor statutorily protected litigation privileges.”
4 *Venetian Casino*, 484 F.3d at 613; *see also Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 936 (9th Cir.2006).
5 There is nothing common about Defendants conspiracy or enterprise of threat and intimidation.
6 Rather, Defendants’ efforts to maintain their monopoly power can only be viewed as unprotected
7 “commercial activity.”
8

9 Likewise, Oregon’s litigation privilege only applies to “statements in the course of or incident
10 to judicial and quasi-judicial proceedings,” and extends only to “parties to such proceedings and to
11 their attorneys.”⁴ *See Mantia v. Hanson*, 190 Or.App. 412, 417, 79 P.3d 404, 407 (Or. App.
12 2003)(citations omitted).
13

14 Defendants’ conspiracy to create and implement an extraordinary nationwide enterprise of
15 threat and intimidation via secret agreement are by no means “common features of litigation,” or
16 “statements in the course of or incident to...proceedings.” Indeed, most of these activities typically
17 occurred well before Ms. Andersen and others similarly situated were even threatened. Obviously, at
18 the time of the scheme was formulated, the Defendants had no idea who Ms. Andersen was. No
19 argument can be made that the illegal conduct alleged occurred as typical litigation.
20

21 Finally, even if the court were to determine that the conspiratorial and investigative activities
22 were incidental to litigation, they are not immune from liability due to the sham exception to *Noerr-*
23 *Pennington*, discussed below. Based on the foregoing, Defendants’ request for dismissal of Ms.
24 Andersen’s claim must be denied.
25

26

⁴ MediaSentry, the RIAA and Settlement Support Center were not parties to the *Atlantic v. Andersen* action, and thus they are not protected by the litigation privilege.

4. Noerr-Pennington Doctrine and Oregon Litigation Privilege

A. Sham Activities Not Protected

Since the *Noerr-Pennington* doctrine originated, the courts have recognized that sham activities disguised as “appeals to the branches of government to redress grievances” will not give rise to immunity. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). Defendants’ systematic abuse of the federal courts is a sham and does not give rise to *Noerr* immunity. In *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972), the U.S. Supreme Court explained that immunity would not apply to “a pattern of baseless, repetitive claims ... which leads the fact finder to conclude that the administrative and judicial processes have been abused.” *Id.* at 513. A sham may be “evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims.” *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973).

The Ninth Circuit has applied the sham exception in the more recent case of *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998). There, the court set forth three separate circumstances in which a defendant’s activities can fall into the sham exception:

First, if the alleged anticompetitive behavior consists of bringing a single sham lawsuit (or a small number of such suits), the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff’s business relationships. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993); *Amarel [v. Connell]*, 102 F.3d 1494, 1518-19 (9th Cir. 1996)]; *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir.1994).

Second, if the alleged anticompetitive behavior is the filing of a series of lawsuits, “the question is not whether any one of them has merit-some may turn out to, just as a matter of chance-but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.” *Id.* at 811 (citing *California Motor Transp.*, 404 U.S. at 512, 92 S.Ct. 609); *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 534 (9th Cir.1991).

Finally, in the context of a judicial proceeding, if the alleged anticompetitive behavior

1 consists of making intentional misrepresentations to the court, litigation can be
2 deemed a sham if “a party's knowing fraud upon, or its intentional misrepresentations
3 to, the court deprive the litigation of its legitimacy.” *Liberty Lake Inv., Inc. v.*
4 *Magnuson*, 12 F.3d 155, 158 (9th Cir.1993); *Clipper Exxpress v. Rocky Mountain*
5 *Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir.1982).

6 *Kottle*, 146 F.3d at 1060.

7 This holding has direct application to Defendants anticompetitive, monopoly-protecting
8 enterprise. Moreover, this specific exception to *Noerr-Pennington* has already been addressed by the
9 Federal Courts in an almost identical case in Florida. In the RIAA case of *UMG Recordings, Inc., et*
10 *al v. Del Cid*, Case No. 8:07-cv-368-T-26TGW (M.D. Fla. Sept. 19, 2007) the court denied the
11 recording industry plaintiffs’ motion to dismiss defendant’s counterclaims, finding that the
12 counterclaim adequately pleaded that RIAA infringement suits amounted to sham litigation, and were
13 not protected by the *Noerr-Pennington* immunity. In doing so, the court stated that the “Defendant
14 alleges that Plaintiffs’ copyright infringement suits amount to sham litigation. The allegations are
15 sufficient to overcome a 12(b)(6) motion to dismiss.” *See* Ex. C to Justus Declaration, at 3.

16 Here, Judge Ashmanskas has already concluded that there was no evidence whatsoever that
17 Ms. Andersen infringed upon copyrighted recordings. Defendants intended to coerce payment from
18 her regardless of whether or not she had committed infringing acts. When he issued his Findings and
19 Recommendation granting Ms. Andersen’s motion for attorney’s fees and costs, Judge Ashmanskas
20 explicitly addressed the frivolity and objective unreasonableness of the Atlantic plaintiffs’ claims
21 against Ms. Andersen. In his 15-page Findings, Judge Ashmanskas wrote:

22
23 Plaintiffs do not specifically concede that they lacked evidence to support their claims,
24 but that may reasonably be inferred from the timing of their stipulation—on the date
25 their opposition to defendant’s motion for summary judgment was due—and their
26 admissions that “evidence uncovered during discovery proved inconsistent and
inconclusive,” which “has not been explained.”...Because they chose instead to
dismiss their claims with prejudice, it can reasonably be inferred that plaintiffs did not
possess prima face evidence, despite being given a fair opportunity to obtain it,...

1 ...
2 Plaintiffs' failure to contact a third party, who potentially was the actual infringer,
3 until April 2007, as well as their position that his denials were credible, while
4 defendant's were not, are also relevant to the third Fogerty factor—objective
5 unreasonableness. Without applying the benefit of hindsight, these facts indicate that,
6 in significant ways, plaintiffs did not conduct themselves in an objectively reasonable
7 manner, *i.e.*, in a manner to be expected from a reasonable copyright holder pursuing
8 relief from a party it believed to be infringing.

9 ...
10 An objectively reasonable copyright holder would seek to hold liable and deter the
11 person who actually violated the Copyright Act.

12 ...
13 Whatever [Atlantic] plaintiffs' reasons for the manner in which they have
14 prosecuted this case, it does not appear to be justified as a reasonable exploration
15 of the boundaries of copyright law.

16
17 *See* Findings and Recommendations of Judge Ashmanskas, entered on September 21, 2007, *Atlantic*
18 *v. Andersen*, Docket #151, Exhibit D to Justus Declaration, at 8-13.

19
20 Ms. Andersen also alleged that Defendants' baseless litigation is not isolated to her case. She
21 cited to a series of specific cases across the country in which RIAA member plaintiffs were forced to
22 dismiss unfounded claims against innocent parties. Amended Complaint, ¶6.9. As the authorities
23 cited above hold, it does not matter that the Defendants might have succeeded, as a matter of chance,
24 in coercing settlement from some of the tens of thousands of people they have threatened and sued. It
25 does not matter that Defendants' investigation might have coincidentally implicated third parties who
26 happened to download copyrighted music.

The issue to consider at this pleading stage is whether the RIAA lawsuits incidental to their
larger enterprise conceivably were "brought pursuant to a policy of starting legal proceedings without
regard to the merits..." *USS-POSCO*, 31 F.3d at 811. Ms. Andersen's Amended Complaint alleged
precisely that circumstance. Amended Complaint, ¶¶6.4-6.24.

Defendants' have mistakenly relied on *Sosa v. DirecTV*, *supra* for the proposition that
sending fraudulent communications demanding payment is immunized under *Noerr-Pennington*.

1 This is simply wrong. In reality, the *Sosa* court declined to pass on the applicability of the sham
2 exception because the plaintiff in that case did not raise it. The *Sosa* court specifically stated that
3 “[w]e need not decide precisely how *PRE II*s or *Kottle*’s definition of sham litigation applies to
4 presuit demand letters in the RICO context, however, because *Sosa* has declined to argue that the
5 letters fall within the sham exception.” *Sosa v. DirecTV*, 437 F.3d 923, 938.
6

7 Defendants have made serious fraudulent statements and misrepresentations to Ms. Andersen,
8 to the putative class, to this Court and to many other federal courts across the country. *Id.* at ¶¶6.15-
9 6.21, 6.26, 6.35, 8.1-8.8. This conduct deprives these RIAA cases of their legitimacy and gives rise to
10 another basis for asserting the sham exception to the *Noerr-Pennington* doctrine.
11

12 **B. The Litigation Privilege is Inapplicable.**

13 The Oregon litigation privilege does not protect defendants where malicious prosecution or
14 wrongful initiation of civil proceedings is alleged:⁵

15 Given the very nature of the “wrongful initiation” cause of action, absolute privilege is
16 inapposite. If a plaintiff can show that, in representing a client in a judicial or quasi-
17 judicial proceeding, an attorney acted “maliciously” and without “probable cause”-
virtually the obverse of a qualified, good-faith privilege-the [defendant] is liable for
wrongful initiation of a civil proceeding.

18 *See Mantia, supra*, 190 Or.App. at 408-409 (alteration supplied). Here, Ms. Andersen has alleged
19 Defendants acted maliciously and without probable cause in initiating and prosecuting the claims
20 against her and the other putative class members. Amended Complaint, ¶¶11.1-11.10. Judge
21 Ashmanskas’ in his Findings and Recommendations has already decided this issue.
22

23 **5. Ms. Andersen Adequately Pleaded a Claim of Negligence.**

24 Although Ms. Andersen has properly alleged that Defendants owed a duty to avoid
25

26

⁵ The *Mantia* court noted that “malicious prosecution” is often used as a shorthand for wrongful initiation of civil proceedings. 190 Or.App. at 412, fn 6. See also discussion *infra*.

1 foreseeable harm to others and generally to act reasonably under the given circumstances. *Slogowski*
2 *v. Lyness*, 324 Or. 436, 927 P.2d 587 (1996). Because of the nature of the conduct, the relationship
3 and legal representations made to her, Ms. Andersen has also alleged that she was owed a heightened
4 duty. Defendants' assertion they had no special relationship with her, however, has no bearing on her
5 ability to state a negligence claim under principles of general reasonableness and foreseeability.
6

7 It is recognized as a matter of public policy that a private detective agency is to be held
8 responsible for damages sustained as a result of its willful, malicious and wrongful acts.
9 *Zampatori v. United Parcel Service*, 125 Misc.2d 405, 479 N.Y.S.2d 470, 473 (N.Y.Sup.,1984).
10 Good faith and reasonable care in conducting private investigations is required. *Id.* Even
11 disregarding that their activities were illegal, Defendants had a duty to conduct their private
12 investigation of Ms. Andersen and many thousands of others in a non-negligent manner.
13

14 Ms. Andersen's Amended Complaint contains sufficient allegations to show that:

- 15 • Defendant RIAA negligently conspired to develop a flawed and illegal investigation
16 scheme; negligently retained MediaSentry to conduct the scheme; and negligently
17 relied on MediaSentry's information to threaten and sue Ms. Andersen and the class
18 members without a basis. Amended Complaint, ¶¶7.2-7.7.
19
- 20 • Defendant MediaSentry negligently failed to obtain requisite licenses before
21 conducting investigations of Ms. Andersen and the class; negligently conspired with
22 the RIAA to devise a flawed and illegal investigation scheme; and negligently
23 conducted investigations of Ms. Andersen and the class. *Id.* at ¶¶7.8-7.10.
- 24 • The Atlantic plaintiffs negligently relied on flawed and illegally obtained
25 investigations in pursuing baseless lawsuits against Ms. Andersen and the class. *Id.* at
26 ¶7.11.

- 1 • Defendant Settlement Support Center negligently relied on flawed and illegally
2 obtained investigations in making coercive communications to Ms. Andersen and the
3 class. *Id.* at ¶7.13.

4 Moreover, all of the Defendants negligently failed to disclose to Ms. Andersen and the class
5 the illegal and flawed nature of the investigation and the inaccuracy of the information gained. They
6 also negligently failed to investigate the identity of the actual infringer. *Id.* at ¶7.15. As alleged, all of
7 Defendants' negligent conduct proximately caused damages to Plaintiff and the putative class. *Id.* at
8 ¶7.16. Since the elements of duty, breach, causation and damages are adequately pled, this Court must
9 allow the negligence claim to be proven.
10

11 Finally, Defendants again mistakenly rely on the notion that all of the varied negligent
12 conduct of Defendants and their agents are subject to blanket protection under the *Noerr-Pennington*
13 doctrine. This reliance is unfounded and misplaced.
14

15 **6. Claims of Fraud and Negligent Representation Sufficiently Plead.**

16 The elements of common-law fraud are: (1) a representation; (2) its falsity; (3) its
17 materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it
18 should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's
19 ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his
20 consequent and proximate injury. *Estate of Schwarz v. Philip Morris Inc.*, 206 Or.App. 20, 135
21 P.3d 409 (Or.App.,2006). In her Amended Complaint, Ms. Andersen alleged that Defendants
22 knowingly made serious fraudulent statements and misrepresentations to her and thousands of other
23 putative class members, including the delivery of communications with material omissions, with the
24 intention that they be relied upon. Ms. Andersen further alleges that Defendants' communications
25 were made in order to intimidate her and the class into paying them thousands of dollars. Amended
26

1 Complaint ¶¶6.15-6.21, 6.26, 8.1-8.8.

2 Defendants contend that Ms. Andersen did not reasonably rely on their representations. This
3 assertion is completely contrary to the specific allegations in her Amended Complaint. *Id.* at ¶8.3-8.6.

4 Her allegations are reasonable and at this state must be accepted as true. Ms. Andersen is not a
5 person with great knowledge or experience in copyright law or computer technology. She was
6 understandably shocked, fearful, and upset, and did in fact reasonably rely on the self-assured
7 statements of Defendants’ lawyers and other agents when they told her that her computer had been
8 used to engage in massive copyright infringement. Her reliance is also understandable considering
9 that agents and employees of a huge multinational corporation with disproportionate sophistication
10 included her in a national enterprise of intimidation. In response, Ms. Andersen invested substantial
11 emotion, time and resources into investigating the integrity of her computer and the allegations of
12 infringement, at the insistence of the Defendant Record Companies. Defendants’ conduct resulted
13 in direct and consequential damages to Ms. Andersen. *Id.*, ¶¶6.34, 6.39, 8.8. Defendants’
14 conflicting contrary assertion is unreasonable and provides no basis to grant a motion to dismiss
15 the pleadings.
16

17
18 The factors (not addressed in the elements of fraud) that give rise to a cause of action for a
19 negligent misrepresentation claim under Oregon law: (1) a special relationship of some kind
20 between plaintiff and defendants; and, (2) that defendants failed to exercise reasonable care by
21 negligently making misleading representations or omitting material facts. *Vigilante.com, Inc. v.*
22 *Argus Test.com, Inc.*, 2005 WL 2218405 (D.Or.,2005); *Prosser v. Safeco Insurance Co.*, 2001
23 U.S. Dist. Lexis 8341 (D. Or. June 15, 2001). Defendants created a “special relationship” with
24 Ms. Andersen and the putative class when they took it upon themselves to conduct flawed and
25 illegal investigations and then to make legal demands and provide legal advice in furtherance of
26

1 their enterprise to protect a virtual monopoly. Defendants were, at the very least, negligent in
2 making false statements or omitting material facts. Amended Complaint, ¶¶ 8.2-8.3, 8.5-8.6.

3 Finally, Defendants again rely on the notion that all of the statements of Defendants and their
4 agents are subject to blanket protection under the *Noerr-Pennington* doctrine. For the reasons set
5 forth *supra*, this reliance is unfounded and misplaced. Based on the foregoing, Defendants' motion to
6 dismiss Ms. Andersen's fraud and negligent misrepresentation claims must be denied.
7

8 **7. RICO Claim Adequately Pleaded.**

9 18 U.S.C. § 1962 (c) provides that "[i]t shall be unlawful for any person employed by or
10 associated with any enterprise engaged in, or the activities of which affect, interstate or foreign
11 commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's
12 affairs through a pattern of racketeering activity or collection of unlawful debt." As specifically
13 detailed in the Amended Complaint, Defendants' illegal activities including: mail fraud; attempts
14 to obtain property with consent induced by wrongful fear and intimidation in violation of the
15 Hobbs Act; extortion; and conspiracy to violate 18 U.S.C. § 1962(c). All of this conduct falls
16 within the definition of "racketeering activity" as defined in 18 U.S.C. § 1961(1). Amended
17 Complaint, ¶¶ 9.6, 9.7, 9.10. The Oregon Racketeer Influenced and Corrupt Organizations Act
18 prohibits similar conduct. ORS 166.715; Amended Complaint at ¶9.2.
19
20

21 Defendants erroneously argue that Ms. Andersen did not adequately allege that they have
22 engaged in a "pattern of racketeering activity" as set forth in 18 U.S.C. § 1962 (c). This statement is
23 not true. First, Ms. Andersen specifically details the acts constituting each incident of racketeering
24 activity. The Amended Complaint describes in detail how Defendants allegedly used MediaSentry to
25 illegally invade Ms. Andersen's computer under false pretenses, and directed Settlement Support
26 Center to attempt to coerce payment from her whether or not she committed any infringing acts. *Id.* at

¶¶6.26-6.29, 9.5, 9.10. The Amended Complaint further describes in detail how Defendants and/or other RIAA member companies used the same or highly similar tactics against other members of the class, and also specifically describes a 2004 attempt to coerce payment from another individual, again with an admitted lack of regard to the individual's liability for the infringing acts. *Id.* at ¶¶6.4-6.25, 9.5-9.6, 9.9-9.11.

Finally, Defendants again rely on the notion that all of the acts of Defendants and their agents are subject to blanket protection under the *Noerr-Pennington* doctrine. For the reasons set forth *supra*, this reliance is unfounded and misplaced. Ms. Andersen's claim for violations of the Racketeer Influenced and Corrupt Organization Act must stand.

8. Abuse of Legal Process Claim Adequately Pleaded.

Contrary to Defendants' assertion, one need only allege the following to properly plead abuse of process: 1) an ulterior purpose, 2) a willful act in the use of process not proper in the regular conduct of the proceeding; and 3) injuries beyond those which are a common burden on parties to litigation. *Pfaendler v. Bruce*, 195 Or.App. 561, 571-572, 98 P.3d 1146, 1152-3 (Or.App.,2004)(citing *Yanney v. Koehler*, 935 P.2d 1235 (Or. App. 1997)). Here, Ms. Andersen has alleged that (despite the fact that Defendants knew the Class members were never observed downloading music), Defendants used the threat of expensive and personal intrusion incidental litigation as a tool to coerce them into paying thousands of dollars for obligations they did not owe. Amended Complaint, ¶10.2. Ms. Andersen also clearly alleged a conspiratorial scheme to conduct illegal investigations in order to monopolize the music distribution industry, and Defendant's improper abuse of the Federal Judiciary. *Id.* at ¶6.3. Abuse of process was clearly alleged. Ms. Andersen also adequately described the injuries she suffered, which were beyond the common burdens faced by a party to litigation.

1 Ms. Andersen does not have to show an “arrest or seizure of property” to support an abuse of
2 process claim, as erroneously argued by Defendants. Nonetheless, Ms. Andersen did suffer a seizure
3 of her private digital property. She was, and continues to be, chilled against the lawful use of her
4 computer for fear of further invasion and harassment by Defendants and their agents. She also
5 invested substantial resources into investigating the integrity of her computer and the allegations
6 of infringement at the insistence of the Defendants. *Id.* at ¶¶6.34, 6.39, 8.8, 10.1-10.4. Allowing
7 all presumptions of truth and reasonable inferences afforded to Ms. Andersen, her claim for abuse of
8 legal process is more than adequately pleaded.

9
10 **9. Claim of Malicious Prosecution Adequately Pleaded.**

11 Contrary to Defendants’ assertions, Ms. Andersen does not have to allege that Defendants
12 initiated criminal proceedings against her. The very notion that baseless lawsuits such as *Atlantic v.*
13 *Andersen* can be filed, without the repercussions afforded through this cause of action, is ridiculous.
14 The elements of malicious prosecution are: “(1) The commencement and prosecution by the
15 defendant of a judicial proceeding against the plaintiff; (2) The termination of the proceeding in
16 the plaintiff’s favor; (3) The absence of probable cause to prosecute the action; (4) The existence
17 of malice, or as is sometimes stated, the existence of a primary purpose other than that of securing
18 an adjudication of the claim; and (5) damages.” *Crosswhite v. Cole*, 2003 WL 23537962 at *5
19 (D.Or. 2003); *See also, Alvarez v. Retail Credit Ass’n of Portland, Or., Inc.*
20 381 P.2d 499, 502 (Or. 1963)(When referring to malicious prosecution, the court stated that
21 Punitive damages may be allowed when *civil proceedings are employed against another for*
22 *improper motives*)⁶.

23
24
25
26

⁶ As noted above, Oregon courts have frequently recognized that “malicious prosecution” is often used as a shorthand
for wrongful initiation of civil proceedings. *See, e.g. Mantia, supra*, 190 Or.App. at 412 fn. 6; *Checkley v. Boyd*, 170

1 Here, Ms. Andersen alleged Defendants acted maliciously and without probable cause in
2 initiating and prosecuting the claims against her and the class members. This wrongful conduct
3 caused damage to Ms. Andersen and the class members. Moreover, the proceeding against her was
4 disposed of in her favor. Amended Complaint, ¶¶11.1-11.10. She has further alleged that the primary
5 purpose of the Defendants' conduct was not to protect the copyrights allegedly at issue, but to
6 maintain the RIAA distribution monopoly. *Id.* at ¶6.25. Thus, Ms. Andersen has pled all of the
7 necessary elements of her malicious prosecution claim.
8

9 **10. Claim for Outrage Adequately Pleaded.**

10 Here as in other claims, Defendants attempt to impose on Ms. Andersen additional elements
11 for causes of action which are not required by Oregon law. In order to maintain a cause of action for
12 intentional infliction of emotional distress (IIED) Ms. Andersen only has to show: (1) an intent by
13 defendant to inflict severe emotional distress on plaintiff; (2) that defendant's acts caused plaintiff
14 severe emotional distress; and (3) that defendant's acts constituted an extraordinary transgression
15 of the bounds of socially tolerable conduct. *Harris v. Pameco Corp.*, 12 P.3d 524 (Or.App. 2000).
16 Although a court may consider the existence of a special relationship, including an employer and
17 employee relationship, between the parties in determining the bounds of socially tolerable
18 conduct, this is certainly not a requirement. *Id.*
19
20

21 Defendants are mistaken that a special relationship is a condition precedent for bringing a
22 claim. *Delaney v. Clifton*, 180 Or. App. 119, 130, 41 P.3d 1099, 1106-07 (Or. App. 2002). The
23 *Delaney* court held that "[w]hether the conduct alleged is sufficiently extreme or outrageous to be
24 actionable is a fact-specific inquiry, one to be made on a case-by-case basis considering the totality of
25 the circumstances." *Id.*, 180 Or. App. at 130, 41 P.3d at 1106, citing *Lathrope-Olson v. Dept. of*
26

Or.App. 721, 736, 14 P.3d 81 (2000), *rev. den.* 330 Or. 239, 1 P.3d 449 (2001)

1 *Transportation*, 128 Or. App. 405, 408, 876 P.2d 345 (Or. App. 1994). The *Delaney* court also
2 specifically discussed application of these claims where no special relationship existed. *See Kraemer*
3 *v. Harding*, 159 Or. App. 90, 976 P.2d 1160 (Or. App. 1999) (IIED claim successfully brought by
4 school bus driver against parents of children who rode on plaintiff's bus).

5
6 As set forth in requisite detail in the Amended Complaint, Defendants' conduct in the
7 investigation, instigation, and continued persecution of the *Atlantic v. Andersen* suit was outrageous.
8 ¶¶12.1-12.6. There has never been any evidence whatsoever where Ms. Andersen infringed upon
9 Defendants' copyrighted recordings. Defendants' agents told her that Defendants intended to coerce
10 payment from her whether or not she had committed infringing acts. Ms. Andersen maintained her
11 innocence in early dealings with Defendants and their agents, and even urged them to inspect her
12 computer to verify it. They refused, and sued her instead. A later inspection of her computer by
13 Defendants' expert was fruitless, but the suit did not end there. Defendants unreasonably demanded
14 facial confrontation with Ms. Andersen's young daughter in an effort to intimidate her into
15 capitulation. The Atlantic plaintiffs irrationally prolonged the case for years and would not dismiss it
16 until the eve of summary judgment for public relations reasons. *Id.* at ¶¶6.26-6.46, 12.2-12.6.

17
18 Defendants' litigation against Ms. Andersen was not only a sham, it was abusive and
19 malicious. Their threats against Ms. Andersen and her daughter were equally abusive and beyond all
20 bounds of social decency. The litigation threats can only be understood as a means for Defendants to
21 extort money from and/or to intimidate her and others similarly situated as part of the RIAA's
22 massive anti-piracy campaign. The employment of such tactics on a massive scale is unprecedented
23 in the history of civil litigation in the federal courts. If nothing else, Defendants' acts are an
24 "extraordinary transgression of the bounds of socially tolerable conduct." Even if a "special
25 relationship" were required, one existed when Defendants undertook to victimize, threaten, extort and
26

1 advise Ms. Andersen. The grossly disproportionate power and sophistication that the Defendants
2 brought to bear against Ms. Andersen in making their extortionate, false accusations and demands for
3 “settlement” payments created a relationship of victimizer and innocent victim.

4 Finally, Defendants again rely without any basis on the notion that all of the conduct of
5 Defendants and their agents are subject to blanket protection under the *Noerr-Pennington* doctrine.
6 For the reasons set forth *supra*, this reliance is unfounded and misplaced. Ms. Andersen’s claim for
7 outrage or IIED must stand.
8

9 **11. Claim under the Computer Fraud and Abuse Act Sufficiently Pleaded.**

10 The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (“CFAA”) prohibits illicit and
11 fraudulent computer-related activities and allows for civil recovery under the circumstances
12 provided in § 1030 (g). That subsection specifically provides:
13

14 Any person who suffers damage or loss by reason of a violation of this section may
15 maintain a civil action against the violator to obtain compensatory damages and
injunctive relief or other equitable relief.

16 As Defendants’ brief acknowledges, the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. §
17 1030, gives rise to a civil action when, as result of a party’s conduct proscribed by the Act, a person
18 suffers losses in excess of \$5,000. See 18 U.S.C. § 1030(a)(5)(B)(i).
19

20 The statute further defines “loss” in § 1030 (e)(11) as:

21 any reasonable cost to any victim, including the cost of responding to an offense,
22 conducting a damage assessment, and restoring the data, program, system, or
23 information to its condition prior to the offense, and any revenue lost, cost
24 incurred, or other consequential damages incurred because of interruption of
service; and “damage” in § 1030 (e)(8): any impairment to the integrity or
availability of data, a program, a system, or
information.

25 Under the statute, then, the elements of a CFAA claim are:
26

(1) intentional access to a computer;

1 (2) without authorization,
2 (3) resulting in any impairment to the integrity or availability of data, a
3 program, a system, or information,
4 (4) that causes “any reasonable cost to any victim” in excess of \$5,000 in the
5 course of a year.

6 Defendants argue that any civil claim arising under the Act requires the access of another’s
7 computer without authorization, citing *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004). What
8 Defendants do not acknowledge is that the 9th Circuit in *Theofel* found that the claim of the defendants
9 for a violation of the CFAA was actionable and the appeals court reversed the district court’s decision
10 to dismiss that claim. The *Theofel* court pointed out that the deceptive nature of the subpoena was an
11 independent basis for invalidating consent:

12 The subpoena may not have been coercive, but it was deceptive, and that is an
13 independent ground for invalidating consent. See Restatement (Second) of Torts §
14 892B(2)-(3). It was a piece of paper masquerading as legal process.

15 *Id.*, 359 F.3d at 1074.

16 Here, Ms. Andersen and the putative class members never authorized Defendants’
17 investigators to access their computers, either impliedly or expressly. Amended Complaint, ¶¶ 6.4,
18 13.3, 13.4. Even if the KaZaA shared file folder was on a person’s computer Defendants were not
19 entitled to use pretext and false pretenses, and masquerade as a peer user for the purpose of employing
20 sophisticated data collection technology. Defendants’ wrongful acts vitiated whatever implied consent
21 they might have had. This gives rise to a claim under the CFAA. *Id.* at ¶13.6.

22 Defendants again rely on the notion that all of the statements of Defendants and their agents
23 are subject to blanket protection under the *Noerr-Pennington* doctrine. In *Del Cid, supra*, the court
24 held that a counterclaim for a CFAA violation would stand despite the recording industry plaintiffs’
25 assertion of *Noerr-Pennington* immunity. For the reasons set forth *supra*, this reliance is unfounded
26 and misplaced.

1 The Defendants' interference with the integrity and capacity of Plaintiff's personal
2 computer impaired the availability and use of files and data. As alleged, Ms. Andersen suffered
3 damages as a result of Defendants' conduct, and while the amount of damages has not yet been
4 formally tabulated, it certainly exceeds \$5,000. Amended Complaint, ¶¶8.8, 13.7. Since all elements
5 of CFAA were pled by Ms. Andersen, the Court must allow this count to stand.
6

7 **12. Claim for Trespass to Chattels Adequately Pleaded.**

8 Ms. Andersen alleges trespass to chattels, an intentional tort which has been described as
9 the "little brother of conversion." *Prosser and Keeton on Torts* 86 (5th ed 1984). In contrast to
10 conversion, in which the interference with the chattel is so great that the actor can justly be
11 required to pay its full value, the gist of the lesser claim of trespass to chattels is the disturbance of
12 the plaintiff's possession. *Laursen v. Morris*, 103 Or.App. 538, 543, 799 P.2d 648 (1990), *rev.*
13 *den.* 311 Or. 150 (1991); *Swank v. Elwert*, 55 Or. 487, 496, 105 P. 901 (1910). *Morrow v. First*
14 *Interstate Bank of Oregon, N.A.* 118 Or.App. 164, *168, 847 P.2d 411, **413 (Or.App. 1993).
15

16 Federal courts have recognized the applicability of the traditional trespass to chattels tort to
17 the appropriation and use of computer technology without the owner's consent. In *CompuServe Inc.*
18 *v. Cyber Promotions, Inc.*, the court held that the defendant's massive deployment of "spam" email
19 would give rise to a trespass claim on the part of the plaintiff's email service provider. 962 F.Supp.
20 1015 (S.D. Ohio 1997). The court noted the damage plaintiff suffered in the form of the drain upon
21 the its computer memory resources caused by the mass emails, which made the plaintiff's services
22 less useful to customers. The court rejected the defendant's argument that plaintiff consented to its
23 use of the email service by connecting to the internet and held that the defendant's acts had exceeded
24 the scope of the consent. "The use of personal property exceeding consent is a trespass." *Id.*, at 1024
25 citing *City of Amsterdam v. Daniel Goldreyer, Ltd.*, 882 F.Supp. 1273 (E.D.N.Y.1995); Restatement
26

1 (Second) of Torts § 256.

2 As the 9th Circuit explained in *Theofel, supra*, 359 F.3d at 1073:

3 A Defendant is not liable for trespass if the plaintiff authorized his entry. *See* Prosser
4 & Keeton § 13, at 70. But “an overt manifestation of assent or willingness would not
5 be effective ... if the Defendant knew, or probably if he ought to have known in the
6 exercise of reasonable care, that the plaintiff was mistaken as to the nature and quality
7 of the invasion intended.” *Id.* § 18, at 119; *cf.* Restatement (Second) of Torts §§ 173,
8 892B(2). Thus, the busybody who gets permission to come inside by posing as a meter
9 reader is a trespasser. *J.H. Desnick, M.D., Eye Servs., Ltd. v. ABC*, 44 F.3d 1345, 1352
(7th Cir.1995). So too is the police officer who, invited into a home, conceals a
recording device for the media. *Cf. Berger v. Hanlon*, 129 F.3d 505, 516-17 (9th
Cir.1997), vacated, 526 U.S. 808, 119 S.Ct. 1706, 143 L.Ed.2d 978 (1999), reinstated
in relevant part, 188 F.3d 1155, 1157 (9th Cir.1999).

10 Here, Ms. Andersen alleged that the Defendants conspired for MediaSentry to break into her personal
11 computer to secretly spy on and steal information or remove files from her computer. Amended
12 Complaint, ¶¶ 6.4, 13.3, 13.4, 14.2. In doing so, the Record Companies willfully used Ms.
13 Andersen’s computer without authorization to appropriate her personal property and information for
14 their own purposes. *Id.* at ¶¶ 13.3, 13.6, 14.1, 14.2. MediaSentry did not have Ms. Andersen’s
15 permission to inspect, copy, or remove private computer files. *Id.* at ¶¶ 6.4, 13.3, 13.4, 14.1 14.2.
16 Their unauthorized invasion and use of Ms. Andersen’s computer constituted an interference with the
17 capacity and integrity of her personal property. Moreover, MediaSentry was not licensed in Oregon
18 or elsewhere to engage in the investigative conduct which occurred. *Id.* at ¶¶6.10. MediaSentry’s
19 activities are illegal and plainly exceed the boundaries of consent relative to file sharing and,
20 therefore, constitute trespass.
21
22

23 Contrary to Defendants’ argument, MediaSentry’s intrusion into Ms. Andersen’s personal
24 computer has caused her damages sufficient for a trespass claim in accordance with §218 of the
25 Restatement Second of Torts and applicable Oregon caselaw. As a direct result of Defendants’
26 interference with the integrity and capacity of her personal computer, Ms. Andersen was, and

1 continues to be, chilled against the lawful use of her computer for fear of further invasion and
2 harassment by Defendants and their agents. She also invested substantial resources into
3 investigating the integrity of her computer and the allegations of infringement at the insistence of
4 the Record Companies. Amended Complaint, ¶¶6.34, 6.39, 8.8, 10.1-10.4, 14.4. Ms. Andersen
5 adequately alleged that Defendants' actions resulted in the impairment to the quality and value of
6 her personal computer under §218(b). In addition, Defendants' conduct has also caused Ms.
7 Andersen's medical and psychological condition to worsen and her symptoms to flare up, forcing
8 her to return to her physician for medical assistance. *Id.*, ¶6.38 Due to her repeated visits to her
9 physician, she has also been prevented from returning to work. *Ibid.* Defendants' wrongful
10 conduct gives rise to damages for bodily harm under §218(d).
11
12

13 Defendants again rely on the notion that all of the varied conduct of Defendants and their
14 agents are subject to blanket protection under the *Noerr-Pennington* doctrine. In *Del Cid, supra*, the
15 court held that a counterclaim for trespass to chattels would stand despite the recording industry
16 plaintiffs' assertion of *Noerr-Pennington* immunity. Exhibit C to Justus Declaration, at 3-4. For the
17 reasons set forth *supra*, this reliance is unfounded and misplaced, and Ms. Andersen's trespass to
18 chattel claim must stand.
19

20 **13. Invasion of Privacy Claims Adequately Pleaded.**

21 The tort of invasion of privacy, in general, protects the right of a plaintiff "to be let alone."
22 *Humphers v. First Interstate Bank*, 298 Or. 706, 714, 696 P.2d 527 (1985)(quoting W. Page
23 Keeton et al., *Prosser and Keeton on the Law of Torts* § 117, at 851 (5th ed 1984)). Included
24 within this "umbrella" tort are the claims of intrusion upon seclusion, false light, and publication
25 of private facts. *French v. Safeway Stores*, 247 Or. 554, 556, 430 P.2d 1021 (1967)(citing Note,
26 *Right to Privacy: Social Interest and Legal Right*, 51 Minn.L.Rev. 531, 539-40 (1967).

1 **a. Intrusion Upon Seclusion**

2 “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of
3 another or his private affairs or concerns, is subject to liability to the other for invasion of his
4 privacy, if the intrusion would be highly offensive to a reasonable person.” *Restatement (Second)*
5 *of Torts* § 652B (1977). Accordingly, to establish a claim for intrusion upon seclusion, a plaintiff
6 must prove three elements: (1) an intentional intrusion, physical or otherwise, (2) upon the
7 plaintiff’s solitude or seclusion or private affairs or concerns, (3) which would be highly offensive
8 to a reasonable person. *Mauri v. Smith*, 324 Or. 476, 482-483, 929 P.2d 307, 310 (Or.,1996)
9

10 Defendants argue, without any basis, that Ms. Andersen was “publicly distributing files over
11 the internet,” and therefore had no expectation of privacy in her personal computer and the
12 information it contained. Ms. Andersen has consistently denied such activity, and there exists no
13 evidence to the contrary. Amended Complaint ¶¶6.26-6.32. Additionally, the cases cited by
14 Defendants for the proposition that a computer user effectively “waives” her expectation of privacy
15 by engaging in peer-to-peer file sharing are inapplicable to Ms. Andersen’s situation. *See, e.g., In re*
16 *Verizon Internet Services, Inc.*, 257 F.Supp.2d 244 (D.D.C. 2003).
17

18 Moreover, as discussed *supra*, even if some third party had created a KaZaA shared file
19 folder on Ms. Andersen’s computer without her knowledge, the implied consent for other users to
20 view and access the contents of such a file would not extend to the unlicensed, illegal, invasive and
21 deceptive MediaSentry activities at issue here. Amended Complaint, ¶13.5. Regardless of
22 Defendants’ baseless assertions to the contrary, Ms. Andersen properly pled a claim for intrusion
23 upon seclusion by alleging that Defendants, while masquerading as anonymous “cyber-sleuths,”
24 invaded her personal computer using pretext and false pretenses. *Id.* at ¶¶ 6.4, 13.3, 13.5, 14.1 14.2.
25
26

b. False Light

1 A person who gives publicity to a matter concerning another that places the other before
2 the public in a false light is subject to liability for invasion of privacy, if: (a) the false light in
3 which the other was placed would be highly offensive to a reasonable person, and (b) the actor
4 had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the
5 false light in which the other would be placed. *Restatement* § 625E (1977). *Reesman v. Highfill*,
6 327 Or. 597, 607, 965 P.2d 1030 (1998) (discussing elements of “false light” claim pursuant to
7 *Restatement (Second) of Torts*).

9 Defendants acknowledge that their complaint accusing Ms. Andersen of committing unlawful
10 acts and owing tens or hundreds of thousands of dollars in money damages is indeed a statement that
11 was publicly filed. In connection with the same document, Defendants publicly claimed that Ms.
12 Andersen stole and possessed songs with profane, racist, and misogynistic titles. Amended
13 Complaint, ¶¶6.35, 15.1. These allegations have been republished countless times on the internet. In
14 addition, Defendants made countless other widely publicized statements and innuendo portraying
15 those accused of copyright infringement as “pirates” and “thieves.” *Id.* at ¶¶ 6.35,15.6. Ms.
16 Andersen’s Amended Complaint contains sufficient allegations to support this claim, and therefore, it
17 must remain a viable cause of action.
18

19 **c. Public Disclosure of Private Facts.**

20 The tort of public disclosure of private facts requires that the tortfeasor publicly disclose
21 private facts about another. *Tollefson v. Price*, 247 Or. 398, 430 P.2d 990 (1967). In contrast to a
22 “false light” claim, the facts disclosed may be true. However, not every disclosure of a private
23 fact will give rise to a claim in tort. The tortfeasor's conduct must be “wrongful” in some respect
24 apart from inflicting emotional distress on the plaintiff. As the court held in *Andersen v. Fisher*
25 *Broadcasting Companies, Inc.*, 300 Or. 452, 469, 712 P.2d 803 (1986):
26

1 [I]n Oregon the truthful representation of facts concerning a person, even
2 facts that a reasonable person would wish to keep private and that are not
3 'newsworthy,' does not give rise to common-law tort liability for damages
4 for mental or emotional distress, unless the manner or purpose of
defendant's conduct is wrongful in some respect apart from causing the
plaintiff's hurt feelings.

5 Here, Defendants' arguments as to this tort are based on the same mistaken assumptions as
6 discussed above with respect to Ms. Andersen's false light claim: (1) statements by Defendants and
7 their agents concerning Ms. Andersen were not published; and (2) all of the statements of Defendants
8 and their agents are subject to *Noerr-Pennington* protection. For the same reasons set forth *supra*,
9 these assumptions are incorrect. Moreover, Ms. Andersen has adequately pled factual allegations, as
10 discussed above, which demonstrate that Defendants' conduct was wrongful in some respect apart
11 from simply causing Ms. Andersen hurt feelings.

12
13 **14. Libel and Slander Claims Adequately Pleaded.**

14 A defamatory communication is one that would subject another to "hatred, contempt or
15 ridicule...[or] tend to diminish the esteem, respect, goodwill or confidence in which [the other] is
16 held or to excite adverse, derogatory or unpleasant feelings or opinions against [the other]." *King*
17 *v. Menolascino*, 276 Or. 501, 504, 555 P.2d 442 (1976) (quoting *Farnsworth v. Hyde*, 266 Or.
18 236, 238, 512 P.2d 1003 (1973)). To be actionable, a communication must be both false and
19 defamatory. *Harley-Davidson v. Markley*, 279 Or. 361, 364, 568 P.2d 1359 (1977). A
20 communication can be defamatory on its face. *Andreason v. Guard Publishing*, 260 Or. 308, 310-
21 11, 489 P.2d 944 (1971). Even a communication that is not defamatory on its face may be
22 defamatory if a reasonable person could draw a defamatory inference from the communication.
23 *King*, 276 Or. at 504, 555 P.2d 442.

24
25
26 Defendants acknowledge that the Atlantic plaintiffs' complaint accusing Ms. Andersen of

1 committing unlawful acts and owing tens or hundreds of thousands of dollars in money damages is
2 indeed a statement that was publicly filed. Defendants publicly claimed that Ms. Andersen stole and
3 possessed songs with profane, racist, and misogynistic titles. Amended Complaint, ¶¶6.35, 16.1.
4 These false allegations were republished countless times on the internet. Further, Defendants have
5 made countless other widely publicized statements and innuendo portraying those accused of
6 copyright infringement as “pirates and thieves.” *Id.* at ¶¶ 6.35,15.6, 16.1. Most recently, in a
7 September 17, 2007 nationwide broadcast of a National Public Radio program (“Marketplace”) RIAA
8 Chairman and CEO Mitch Bainwol accused Ms. Andersen of lying when he stated to millions of
9 listeners: “I would remind you that folks, when they have a legal dispute, often can be creative with
10 the way they portray the facts.” As demonstrated in her Amended Complaint, Ms. Andersen
11 adequately alleged a set of facts demonstrating that Defendants communicated information to others,
12 either by written or spoken word, relating to Ms. Andersen that was defamatory on its face or that a
13 reasonable person could draw a defamatory inference.
14
15

16 **15. Deceptive Business Practices Claims Adequately Pleaded.**

17 Ms. Andersen has adequately alleged a claim for violation of the Oregon Unlawful Trade
18 Practices Act, ORS 646.605 *et seq.* The elements of common law fraud are distinct and separate
19 from the elements of a cause of action under the Act, which are much more easily shown. *See,*
20 *e.g., Sherrod v. Holzshuh*, 274 Or. 327, 546 P.2d 470 (1976); *Scott v. Western Int. Sales, Inc.*, 267
21 Or. 512, 517 P.2d 661 (1973). As set forth in detail in her Amended Complaint, Defendants made
22 serious fraudulent statements and misrepresentations, and sent communications with material
23 omissions, to Ms. Andersen and the putative class members with the intention that those statements
24 and misrepresentations be relied upon. Amended Complaint ¶¶6.15-6.21, 6.26, 6.35, 8.1-8.8.
25
26 Defendants made these fraudulent statements, misrepresentations and omissions so as to intimidate

1 Ms. Andersen and the class into paying them thousands of dollars. *Id.* at ¶¶8.5-8.6.

2 Defendants erroneously contend Ms. Andersen did not reasonably rely on any of their
3 misrepresentations. Ms. Andersen did, in fact, reasonably rely on various misrepresentations made
4 by Defendants and their agents, and she has adequately set forth the basis for these allegations. *Id.* at
5 ¶8.3-8.6, 17.6, 17.8. For instance, Ms. Andersen's Amended Complaint reflects that she is not a
6 person who has great knowledge or experience in the areas of copyright law or computer technology.
7

8 When Defendants contacted Ms. Andersen, she was understandably shocked, fearful, and upset, and
9 did in fact reasonably rely at that stage on their self-assured statements that her computer had been
10 used to engage in massive copyright infringement. Such reliance seems reasonable considering that
11 Ms. Andersen was contacted by agents and employees of huge multi-national corporations, who have
12 disproportionate sophistication in the relevant areas, and who had included her in a national enterprise
13 of intimidation. In direct response to Defendants' allegations, Ms. Andersen invested substantial
14 emotion, time and resources into investigating the integrity of her computer *Id.* at ¶¶6.34, 6.39,
15 8.8.
16

17 Defendants again rely on the notion that all of their conduct and the conduct of their agents
18 are subject to blanket protection under the *Noerr-Pennington* doctrine. In *Del Cid, supra*, the court
19 held that a counterclaim under the Florida Deceptive and Unfair Trade Practices Act would stand
20 despite the recording industry's plaintiffs' assertion of *Noerr-Pennington* immunity. The elements of
21 for a claim under that statute are virtually identical as for the Oregon Unlawful Trade Practices Act.
22 *See, e.g. Rollins Inc. Orkin Exterm. Co.*, 951 So.2d 860, 869 (Fla. Dist. Cit. App. 2006). For the
23 reasons set forth *supra*, Defendants' reliance on *Noerr* immunity is unfounded and misplaced.
24 Therefore, Ms. Andersen's claim for violation of the Oregon Unlawful Trade Practices Act has been
25 properly pleaded and must stand.
26

1
2
3 **16. Claim for Copyright Misuse Adequately Pleaded.**
4

5 This Court should also decline to dismiss Ms. Andersen's copyright misuse claim. First,
6 while copyright misuse jurisprudence is still evolving, patent misuse law, to which copyright
7 misuse owes its origin, provides for independent misuse claims such as the one brought here.
8 Further, copyright misuse claims have been recognized as particularly appropriate where, as here,
9 a party seeks a declaratory judgment that Defendants forfeited the exclusive rights they possess in
10 and to the sound recordings which they allege Ms. Andersen to have infringed. *Amended*
11 *Complaint*, ¶18.6.; *See also Electronic Data Systems Corp. v. Computer Associates Intern., Inc.*,
12 802 F. Supp. 1463, 1465-1466 (N.D. Tex. 1992)(Court held that claim of copyright misuse could
13 be raised in action for declaratory judgment of noninfringement to show that defendants misuse of
14 copyrighted software rendered its copyrights invalid and unenforceable).
15

16 Copyright misuse derives from the patent misuse doctrine, which was recognized by the
17 Supreme Court in 1942. *See Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 494 (1942)("It is
18 the adverse effect upon the public interest of a successful infringement suit in conjunction with the
19 patentee's course of conduct which disqualifies him to maintain the suit...."). In *Lasercomb*
20 *America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990), the Fourth Circuit extended the misuse
21 doctrine to copyrights:
22

23 The origins of patent and copyright law in England, the treatment of these two
24 aspects of intellectual property by the framers of our Constitution, and the later
25 statutory and judicial development of patent and copyright law in this country
26 persuade us that parallel public policies underlie the protection of both types of
intellectual property rights. We think these parallel policies call for application of
the misuse defense to copyright as well as patent law.

1 *Id.* at 974. The copyright misuse doctrine is now recognized by most federal circuit courts. *See,*
2 *e.g., Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516 (9th Cir. 1998) (finding copyright misuse
3 where plaintiff engaged in anticompetitive behavior); *Alcatel USA, Inc. v. DGI Techs.*, 166 F.3d
4 772, 793 (5th Cir., 1999) (finding that plaintiffs used its copyrights to gain commercial control
5 over products it did not have copyrighted); *Assessment Techs. of Wi, LLC v. WIREdata, Inc.*, 350
6 F.3d 640, 647 (7th Cir. 2003) (holding that a copyright misuse does not require a showing of
7 antitrust violations); *Broad. Music v. Hearst/ABC Viacom Servs.*, 746 F. Supp. 320, 328 (S.D.N.Y.
8 1990) (recognizing copyright misuse defense.)

9
10 While some early cases declined to treat copyright misuse as an affirmative claim, the
11 doctrine is still evolving. Therefore, it is appropriate for the Court to take guidance from the
12 patent misuse doctrine from which copyright misuse derives. *See, e.g., Video Pipeline, Inc. v.*
13 *Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 204 (3d Cir. 2003) (looking to patent misuse law
14 for assistance in deciding copyright misuse claim). In the patent context, several federal district
15 courts have recognized that misuse can be pled as an independent claim. *See, e.g., Matsushita*
16 *Elec. Indus. Co. Ltd. v. CMC Magnetics Corp.*, No. C 06-04538, 2006 WL 3290413 (N.D. Cal
17 Nov. 13, 2006) (holding that patent-pooling, licensing, and participation in standard setting
18 organizations can give rise to unlawful activity that is properly challenged with a patent misuse
19 counterclaim); *Marchon Eyewear, Inc. v. Tura LP*, No. 98 CV 1932, 2002 WL 31253199
20 (E.D.N.Y. Sept. 30, 2002) (denying plaintiff's motion to dismiss defendant's patent misuse
21 counterclaim); *Affymetrix, Inc. v. PE Corp. (N.Y.)*, 219 F. Supp. 2d 390, 398 (S.D.N.Y. 2002)
22 (denying defendants' motion to dismiss plaintiff's patent misuse claim); *see also generally*
23 *Critical-Vac Filtration Corp. v. Minuteman Int'l, Inc.*, 233 F.3d 697, 703-704 (2d Cir. 2000)
24 (“[C]ounterclaims related to misuse and other more economically oriented antitrust claims would
25
26

1 seem generally to be distinct in nature and substance from patent validity and infringement
2 issues”).

3 In addition, courts have recognized that an affirmative copyright misuse claim may be proper
4 where, as here, a party seeks declaratory judgment of noninfringement. In *Open Source Yoga*
5 *Unity v. Choudhury*, for example, the court permitted a declaratory relief plaintiff to assert
6 copyright misuse because the plaintiff was likely to be accused of copyright infringement. 2005
7 U.S. Dist. LEXIS 10440 at 25* (N.D. Cal. Apr. 1, 2005)(citing *Practice Mgmt Info. v. AMA*, 121
8 F.3d 516, 520 (9th Cir. 1997)). The same reasoning applies here. Ms. Andersen seeks declaratory
9 relief because Defendants forfeited the exclusive rights they possessed by engaging in illegal
10 conduct.
11

12 **17. Claim for Civil Conspiracy Adequately Pleaded.**

13
14 In order to plead a claim for civil conspiracy, Ms. Andersen must adequately allege the
15 following: (a) two or more parties; (b) with an object to be accomplished; (c) a meeting of the
16 minds on the object to be accomplished or a course of action; (d) one or more unlawful overt acts;
17 (e) damages as a proximate result thereof. *Richmark Corp. V. Timber Falling Consultants, Inc.*
18 1989 Westlaw 81622 (D. Or. 1998); *Bonds v. Landers*, 279 Or. 169 (1997).
19

20 In the instant case, Ms. Andersen’s Amended Complaint contains allegations concerning the
21 common conspiracy of Defendants to develop a massive enterprise of threat and intimidation.
22 Amended Complaint, ¶¶6.3, 19.1, 19.2. Ms. Andersen has adequately alleged the existence of a
23 secret agreement between Defendants to devise and implement an investigative protocol utilizing
24 MediaSentry. *Id.* at ¶6.3. In developing and implementing this protocol, Defendants knew that it was
25 illegal, flawed, and could not specifically identify Ms. Andersen or the others they targeted. *Id.* at
26

¶¶6.3-6.10. Finally, the fundamental purpose of Defendants' enterprise was to retain monopolistic control over the distribution of sound recordings. *Id.* at ¶¶ 6.1, 6.25, 19.1, 19.2.

Defendants again rely on the notion that all of the conduct of Defendants and their agents described in the Amended Complaint are subject to blanket protection under the *Noerr-Pennington* doctrine. In *Del Cid, supra*, the court held that a counterclaim for civil conspiracy would stand despite the recording industry plaintiffs' assertion of *Noerr-Pennington* immunity. The elements of a claim for civil conspiracy under Florida are virtually identical as those under Oregon law. *See, e.g. Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. Dist. Cit. App. 1997). For the reasons set forth *supra*, Defendants' reliance on *Noerr* immunity is unfounded and misplaced. Based on the allegations as set forth in Ms. Andersen's Amended Complaint, her claim against Defendants for civil conspiracy must remain viable.

III. CONCLUSION

With respect to all claims in her Amended Complaint, Ms. Andersen alleged a legally sufficient basis for recovery against the Defendants. Taking the facts in the Amended Complaint as true Defendants' Motion to Dismiss the Amended Complaint must be denied.

Respectfully submitted this 28th day of September, 2007.

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I

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2
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4 **FOR THE DISTRICT OF OREGON**

5 **AFFIDAVIT OF SERVICE**

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7) ss.
8 County of King)

9 I hereby certify and declare that on the 28th day of September, 2007, I electronically filed the foregoing
10 Plaintiff's Opposition to Defendants' Motion to Dismiss First Amended Complaint with the Clerk of the Court
11 using the CM/ECF system, which will send notification of such filing to the following:

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